

August 2, 2005

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W., TW-A325
Washington, D.C. 20554

Re: Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, CC Docket No. 02-33; IP-Enabled Services, WC Docket No. 04-36; and Petition of Bell South Telecommunications, Inc., for Forbearance Under 47 U.S.C. 160(c) from Application of Computer Inquiry and Title II Common Carriage Requirements, WC Docket No. 04-405

Notice of Written *Ex Parte* Presentation

Dear Ms. Dortch:

In light of the U.S. Supreme Court's recent decision in *NCTA v. Brand X Internet Services*, it appears the Federal Communications Commission (Commission or FCC) may soon act to establish a regulatory framework for cable and wireline broadband services.¹ The National Telecommunications Cooperative Association (NTCA)² therefore submits this written *ex parte* presentation to clarify its position concerning the future regulatory treatment of broadband services offered by rural ILECs. NTCA specifically recommends that the FCC establish a flexible regulatory framework for rate-of-return (RoR) regulated rural telephone companies which includes the following:

1. Allow RoR rural ILECs the option of offering their broadband transmission services through the use of the National Exchange Carrier Association (NECA) tariffs and allow these carriers to participate in NECA's associated revenue pools.
2. If a rural ILEC chooses to offer its broadband transmission services through NECA tariffs, the costs associated with providing these services are regulated costs under the Commission's rules.

¹ *National Cable Telecommunications Association, et al. v. Brand X Services et al.*, Slip Opinion, 04-277 (Supreme Court)(June 27, 2005), which can be found at: <http://www.fcc.gov/ogc/documents/opinions/2005/04-277-062705.pdf>.

² NTCA is the premier industry association representing rural telecommunications providers. Established in 1954 by eight rural telephone companies, today NTCA represents 560 rural rate-of-return regulated incumbent local exchange carriers (ILECs). All of its members are full service local exchange carriers, and many members provide wireless, cable, Internet, satellite and long distance services to their communities. Each member is a "rural telephone company" as defined in the Communications Act of 1934, as amended (Act). NTCA members are dedicated to providing competitive modern telecommunications services and ensuring the economic future of their rural communities.

3. Require all cable, wireline, wireless, satellite and other broadband transmission service providers to contribute to the universal service fund (USF) mechanisms based on the revenues derived from these services to ensure sufficient, predictable, and sustainable universal service support in the future.
4. Require all facilities-based and non-facilities-based voice over Internet protocol (VoIP) and other IP-enabled service providers regardless of the classification of their service as an information service, telecommunications service, private carriage service or some other service to contribute to the USF mechanisms.

NTCA cautions the Commission that mandatory detariffing of broadband transmission will not foster broadband investment for all carriers. If it changes the regulatory classification of broadband transmission services, the Commission should adopt a flexible approach that permits tariffing with pricing flexibility for those carriers who choose to remain under RoR regulation.

RoR regulation enables rural ILECs to obtain the capital necessary to build, operate and maintain telecommunications facilities. RoR regulation minimizes the risks involved, providing investors and lenders a reasonable degree of assurance that the rural incumbent LEC will remain financially solvent. RoR regulation has helped small and rural carriers grow and provide quality, reliable and affordable telecommunications services to rural America.

The NECA pooling structure, in place for the last two decades, similarly works as a stabilizing factor for small carriers by reducing administrative costs, creating incentives and spreading the substantial risks of investing in rural areas among its participants. RoR regulation and the pooling structure have enabled rural carriers to not only survive, but to thrive. Americans living in remote and difficult to serve regions of the United States have access to state of the art telecommunications services because they have been under a regime that allows them to recover their investment and a reasonable return.

Given intense competition from cable broadband providers as well as other broadband technologies, relaxing regulatory restrictions on digital subscriber line (DSL) services will allow some DSL transmission providers to compete on a more level playing field. Some RoR carriers, however, face different challenges and market conditions than their urban counterparts. The tariffing of broadband transport within the NECA pool permits RoR carriers to share risks and offer xDSL services at attractive rates.

Many RoR regulated rural ILECs are offering xDSL services.³ However, ubiquitous deployment is very costly. The upgrading of certain long loops is estimated to cost almost \$10,000 per loop.⁴ Full deployment requires a substantial investment, yet rural carriers lack the subscribers over which to spread the cost. Without the NECA pool, many rural carriers would be forced to forego providing high-speed service because they would have to price it out of the range of affordability. The rural consumer would suffer and lag technologically behind those residing in urban areas, counter to the expressed goals of the Act.

³ NTCA 2003 Internet/Broadband Availability Survey, available at www.ntca.org.

⁴ NECA Rural Broadband Cost Study: Summary of Results, p. 4 (June 21, 2000).

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While not all wireline broadband Internet access service will currently meet the Commission's definition of "advanced telecommunication service,"⁵ the existence of the NECA pools is a necessary predecessor to advanced services roll out. The Commission should not abandon policies and practices that have promoted broadband deployment in rural areas. The Commission should therefore adopt a flexible approach that permits tariffing with pricing flexibility for those carriers who choose to remain under rate-of-return regulation and require all providers of broadband transmission to make USF contributions, regardless of the classification of broadband transmission service as an information service, telecommunications service or private carriage service.

Lastly, the effect of the recent Supreme Court's decision in *Brand X* may mean that cable modem Internet access service will be regulated as an information service under Title I of the Communications Act, as amended.⁶ A Title I classification would initially mean that cable modem broadband service is not subject to mandatory USF contributions. Pursuant to its Title I ancillary jurisdiction, however, the Commission should require cable, wireline, wireless, and satellite companies to make USF contributions to the extent they provide broadband transmission services on a stand alone basis to affiliated or non-affiliated Internet Service Providers (ISPs) or end-users.⁷ In addition, the Commission should also expand the list of USF contributors to include both facilities-based and non-facilities-based VoIP and other IP-enabled service providers regardless of the classification of their service as an information service, telecommunications service, private carriage service, or some other service.

The technology that consumers want and expect to have access to is changing. As Congress anticipated, the current definition of universal service must evolve to keep pace with the consumer need. Universal service support ensures comparable and affordable services throughout the nation. Cable, wireline, wireless and satellite providers of broadband Internet access and VoIP/IP-enabled service providers will interconnect with or utilize the critical public communication network and benefit from the nationwide infrastructure made possible by universal service. They should therefore all contribute to the universal service funding mechanisms. Expanding the list of contributors to the fund will be critical to this Nation's continued success in providing all Americans, rural and urban, access to affordable and comparable communications services.

Pursuant to Section 1.1206 of the Commission's rules, a copy of this letter is being filed via ECFS with your office. If you have any questions, please do not hesitate to contact me at (703) 351-2016.

Sincerely,

/s/ Daniel Mitchell

Daniel Mitchell

Vice President, Legal and Industry

⁵ The Commission has defined "advanced telecommunications capability" as "having the capability of supporting, in both the provider-to customer (downstream) and the customer-to-provider (upstream) directions, a speed (in technical terms, 'bandwidth') in excess of 200 kilobits per second (kbps) in the last mile." *Second Section 706 Report*, 15 FCC Rcd at 20919-20.

⁶ *National Cable Telecommunications Association, et al. v. Brand X Services et al.*, Slip Opinion, 04-277 (Supreme Court)(June 27, 2005), which can be found at: <http://www.fcc.gov/ogc/documents/opinions/2005/04-277-062705.pdf>.

⁷ 47 U.S.C. §§ 151-160.

cc: Kevin Martin, FCC Chairman
Kathleen Abernathy, FCC Commissioner
Jonathan Adelstein, FCC Commissioner
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